Supreme Court, U.S.
FILED
SEP 10 200
CLERK

(3)

No. 01-176

IN THE

Supreme Court of the United States

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA,

Petitioner,

v.

TEXTRON FINANCIAL CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District

REPLY BRIEF FOR PETITIONER

MITCHELL C. TILNER
PETER ABRAHAMS
HORVITZ & LEVY L.L.P.
15760 Ventura Boulevard
18th Floor
Encino, California 91436
(818) 995-0800

JOHN G. ROBERTS, JR.*
CATHERINE E. STETSON
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

* Counsel of Record

Counsel for Petitioner

9PP

TABLE OF AUTHORITIES

Page

Cases:

Bertero v. *National General Corp.*, 529 P.2d 608 (Cal. 1974) 3
Cooper Industries, Inc. v. *Leatherman Tool Group, Inc.*, 121 S. Ct. 1678 (2001) ..... *passim*
Moradi-Shalal v. *Fireman's Fund Ins. Cos.*, 758 P.2d 58 (Cal. 1988) 3
Neal v. *Farmers Ins. Exchange*, 582 P.2d 980 (Cal. 1978) 3
People v. *Birks*, 960 P.2d 1073 (Cal. 1998) 3
San Paolo U.S. Holding Co. v. *Simon*, 121 S. Ct. 2190 (2001) ..... *passim*
Sweatman v. *Department of Veterans Affairs*, 18 P.3d 29 (Cal. 2001) 2
Torres v. *Parkhouse Tire Serv.*, 2001 WL 987596 (Cal. Aug. 30, 2001) 2
Wallis v. *Farmers' Group, Inc.*, 269 Cal. Rptr. 299 (Ct. App. 1990) 4

Constitutional Provision:

U.S. Const. amend. XIV 1, 4

Statute:

Cal. Civ. Proc. Code § 662.5(b) (West 2001) 4

Rule:

Cal. R. Ct. 29(b)(2) 2

IN THE

Supreme Court of the United States

No. 01-176

NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PENNSYLVANIA,

Petitioner,

v.

TEXTRON FINANCIAL CORPORATION,

Respondent.

**On Petition for a Writ of Certiorari
to the Court of Appeal of California,
Fourth Appellate District**

REPLY BRIEF FOR PETITIONER

Before this Court decided *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 121 S. Ct. 1678 (2001), the California appellate courts regularly employed a permissive standard of review when examining the constitutionality of a punitive damages award. Applying that lenient standard in this case, the California Court of Appeal rejected petitioner National Union's Fourteenth Amendment challenge to a punitive damages award amounting to over twenty times compensatory damages, affirming the judgment after declaring that it was "presumed to be correct" and reviewing the record "most favorably to the judgment." Pet. App. 24a. National Union petitioned the Supreme Court of California

for review of the Court of Appeal's ruling, explaining that the intermediate court should have engaged in an independent review of its constitutional claim, but the court denied National Union's petition without comment. *Id.* 43a. Twelve days after that, this Court issued *Cooper Industries*, holding that appellate courts "should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards." 121 S. Ct. at 1685-86.

In light of *Cooper Industries*, it is clear that the Court of Appeal applied the wrong standard of review. This Court recognized as much when it granted certiorari in a nearly identical case, vacated the Court of Appeal's decision, and returned the case to that court for further consideration. *San Paolo U.S. Holding Co.* v. *Simon*, 121 S. Ct. 2190 (2001). As it did there, this Court should grant certiorari, vacate the decision of the California Court of Appeal, and return this case to that court for proper consideration in light of *Cooper Industries*.

1. Respondent argues that National Union waived the right to seek further review of the Court of Appeal's constitutional ruling when it did not seek rehearing on that aspect of the court's decision. That is wrong. Rule 29 of the California Rules of Court states that a party need not seek rehearing in the Court of Appeal to preserve an issue for review in the California Supreme Court unless the Court of Appeal has "omitted * * * or misstated" an "issue or material fact." Cal. R. Ct. 29(b)(2); *see Torres* v. *Parkhouse Tire Serv.*, 2001 WL 987596, at *1 n.1 (Cal. Aug. 30, 2001) (because petitioner had not sought correction of factual error on petition for rehearing, California Supreme Court would not consider factual dispute on appeal); *Sweatman* v. *Department of Veterans Affairs*, 18 P.3d 29, 33 n.1 (Cal. 2001) (where Court of Appeal had neglected to address issue of exhaustion of remedies and petitioner had not sought rehearing to correct omission, California Supreme Court would not

consider issue). Aside from such omissions or misstatements, "[a]ll other issues and facts may be presented in the petition for review without the necessity of filing a petition for rehearing." Cal. R. Ct. 29(b)(2).

Adhering to Rule 29(b)(2), National Union sought rehearing of certain aspects of the Court of Appeal's decision, arguing that the court had omitted or misstated several facts material to its decision. *See* Opp. App. 50-53. National Union did not seek rehearing of the Court of Appeal's decision affirming the trial court's punitive damage award, because it would have been inappropriate—not to mention unavailing—for National Union to challenge what was then the settled standard of review of punitive damage awards by seeking rehearing in the intermediate court.

Before *Cooper Industries* was decided, the California Supreme Court had repeatedly held that a punitive damages award was to be reviewed "in a light most favorable to the judgment," to determine whether the jury's award was the result of "passion or prejudice." *Neal* v. *Farmers Ins. Exchange*, 582 P.2d 980, 986 (Cal. 1978); *Bertero* v. *National General Corp.*, 529 P.2d 608, 624 n.12 (Cal. 1974). The Court of Appeal had consistently applied that lenient standard, up to and including this case. *See* Pet. for Cert. 11-13 (citing cases); Pet. App. 24a. The intermediate court was not in a position to change the settled standard of review, and National Union's arguments against that standard were properly directed to the California Supreme Court in the first instance. *See People* v. *Birks*, 960 P.2d 1073, 1077 n.6 (Cal. 1998) (because "[t]he Court of Appeal must follow, and has no authority to overrule, the decisions of this Court," respondent's argument that petitioner should have raised, in Court of Appeal, an argument requiring the overruling of California Supreme Court precedent was "specious"); *Moradi-Shalal* v. *Fireman's Fund Ins. Cos.*, 758 P.2d 58, 60 n.1 (Cal. 1988) (rejecting argument that issue should have been raised in Court of Appeal; "clearly it was pointless for the defendant to

ask either the trial or the appellate court to overrule one of our decisions").

2. Textron next argues that National Union "invited" the Court of Appeal to apply a lenient standard of review when examining the constitutionality of the punitive damages award because it "urged the court [of appeal] to apply an abuse of discretion standard." Opp. 2, 11, 14, 15. Textron is purposely conflating two separate arguments advanced in two separate briefs in response to two separate issues.

In National Union's opening brief on appeal, it urged the Court of Appeal to review the punitive damage award and reject it as unconstitutionally excessive. Under *Cooper Industries*, that constitutional question should have been reviewed *de novo*. 121 S. Ct. at 1683. In Textron's brief on its cross-appeal, Textron argued that the trial court should not have ordered a remittitur at all. Responding to Textron's argument in its combined opposition and reply brief—and after again pressing its point that the $1.7 million award violated the Fourteenth Amendment—National Union argued that "[a]ssuming punitive damages are proper at all and that the $1.7 million award is not excessive, the trial court's remittitur should be affirmed."[1] That separate issue—whether the trial court properly ordered a remittitur—is reviewed on appeal for abuse of discretion. Cal. Civ. Proc. Code § 662.5(b) (West 2001); *Wallis* v. *Farmers' Group, Inc.*, 269 Cal. Rptr. 299, 312 (Cal. Ct. App. 1990). National Union articulated that standard in response to Textron's cross-appeal, *not* in its own constitutional challenge to the hefty punitive damages judgment remaining after remittitur. *See* Opp. App. 40, 42.

3. Having exhausted its technical objections, Textron resorts to obfuscation. First, it recharacterizes National

[1] Combined Appellant's Reply Brief, Cross-Respondent's Brief, and Respondent's Brief on Separate Appeal at 50; *see id.* at 53 (same).

Union's petition as having argued that the Court of Appeal "ignored federal punitive damages standards." Opp. 15; *id.* at 23 ("National Union's petition is based on the erroneous assumption that the Court of Appeal never evaluated federal law punitive damages standards"). From this flawed starting point, Textron launches into a lengthy—and completely irrelevant—discussion of state and federal "guideposts" for review of punitive damages awards, *id.* at 16-21, explaining at length that the Court of Appeal "appreciate[d] the differences between federal and state punitive damages law." *Id.* at 20.

National Union did not petition for certiorari on the ground that the Court of Appeal "ignored federal punitive damages standards." *Id.* at 15. It sought certiorari because when the Court of Appeal evaluated those federal guideposts, it applied a standard of review this Court has found to be too lax, stating that the punitive award was "*presumed to be correct*" and would be reversed "only if the record, *viewed most favorably to the judgment*, reflects [that] the award is the result of passion or prejudice." Pet. App. 24a (emphases added). *That* is the issue in this case, and Textron offers no substantive response to it. Indeed, in its thirty-page opposition, Textron never mentions the lenient standard of review the Court of Appeal employed in examining the punitive award. Rather than confronting that unambiguous text, Textron repeats the mantra (four times on page 21 alone) that the Court of Appeal "independently" considered the constitutionality of that award. *See, e.g.*, Opp. 1, 15, 21, 22, 23, 30. Repeating something does not make it so. The Court of Appeal examined the constitutionality of the punitive damages award by first *presuming* the punitive damages determination to be correct, viewing the record "most favorably to the judgment," and immediately after that, discussing the *BMW* standards. Pet. App. 24a. The Court of Appeal did the same thing in *San Paolo*, the decision this Court vacated and

remanded after *Cooper Industries*. *See* Pet. App. (No. 00-1457) at A-28, A-31.

4. Textron's remaining arguments are also meritless. It argues that the $1.7 million punitive damages award was proper under any standard of review because National Union's conduct was reprehensible. Opp. 24-27. But the Court of Appeal never addressed that argument. It concluded that National Union was responsible for the actions of its affiliate, and it specifically declined to address whether National Union's own actions warranted the punitive award. *See* Pet. App. 21a (declining to consider National Union's argument on "the insufficiency of the evidence based on its own conduct"). If this Court vacates the judgment and remands, the Court of Appeal can address Textron's arguments when it independently considers the constitutional propriety of a punitive award against National Union—under the correct standard of review. Textron also suggests that the original jury verdict should be reinstated. Opp. 27-29. It did not petition for certiorari on that issue.

5. Most tellingly, only in passing does Textron acknowledge *San Paolo U.S. Holding Co.* v. *Simon*, in which this Court granted certiorari, vacated the decision of the Court of Appeal applying a deferential standard of review on a constitutional challenge to a punitive damage award (for the same amount at issue here, no less), and remanded for consideration in light of *Cooper Industries*. 121 S. Ct. 2190 (2001). Textron attempts to distinguish *San Paolo* by explaining that the Court of Appeal in *San Paolo* "fail[ed] to appreciate the differences between federal and state punitive damages law," as if that somehow precipitated the GVR in that case. Opp. 20. Not so. The Court of Appeal in *San Paolo* articulated the *BMW* standards; but just as it did here, it applied a too-lenient standard of review when it examined the constitutionality of the punitive damage award. Pet. App. (No. 00-1457) A27-28, A31. That is why the judgment in that case was appropriate for further consideration after

Cooper Industries. So too here. This Court should follow the same course it took in *San Paolo*: grant certiorari, vacate, and remand for consideration in light of *Cooper Industries*.

CONCLUSION

For the foregoing reasons, and for those in the petition, the petition should be granted, the judgment below vacated, and the case remanded for further consideration in light of *Cooper Industries* v. *Leatherman Tool Group*.

Respectfully submitted,

MITCHELL C. TILNER
PETER ABRAHAMS
HORVITZ & LEVY L.L.P.
15760 Ventura Boulevard
18th Floor
Encino, California 91436
(818) 995-0800

JOHN G. ROBERTS, JR.*
CATHERINE E. STETSON
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

* Counsel of Record

Counsel for Petitioner